Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-706

ARBRY McCULLEY, ADMINISTRATOR OF THE ESTATE OF BOOKER CLEMONS, DECEASED,

Petitioner,

vs.

MITSUI O. S. K. LINES, LTD. AND BABA-DAIKO SHOSEN, K. K.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONDENTS' BRIEF IN OPPOSITION.

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The respondents, Mitsui O. S. K. Lines, Ltd. and Baba-Daiko Shosen, K. K., respectfully request that this Court deny the petition for writ of certiorari seeking review of the Seventh Circuit's opinion in this case. That opinion is reported at 596 F. 2d 746.

REASONS WHY THE WRIT SHOULD BE DENIED.

The thrust of petitioner's argument is that the court below wrongly concluded that there was insufficient evidence to permit a reasonable jury to find the vessel negligent. But, in an effort to persuade the Court that the importance of this case transcends its facts, petitioner has offered a potpourri of claimed legal issues that either do not arise on the record of this case, or are otherwise unworthy of the Court's attention.

I.

THE QUESTION OF A BAR TO PLAINTIFF'S RECOVERY DOES NOT ARISE ON THE RECORD OF THIS CASE.

With respect to the first "Question Presented," the Court of Appeals did not hold (or even intimate) that stevedore negligence should operate as a bar to a longshoreman's right of recovery under section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act. 33 U. S. C. § 905(b). The jury found that plaintiff's own negligence contributed 13% to his injury. The Court of Appeals concluded that defendants were not at fault at all, and merely stated that, if there had been any negligence associated with the hatch-opening operation, it would have been the stevedore's, and not the vessel's. Pet. 10a.

The forward tanks located in the No. 4 hold were opened by the ship's crew at the express direction of the stevedore's foreman hours after unloading operations had begun. The crew was not told to rig "safety lines," and did not do so. Nevertheless, plaintiff claimed, solely on the basis of an alleged custom whereby safety lines would be rigged by the ship's crew around open tanks in which no one was to be working, that the vessel's

failure to rig such lines constituted negligence.[1] However, because the crew was instructed to open the tanks so that the longshoremen could work in them on their return from dinner, the alleged custom, pertaining to tanks that were not to be worked, did not apply.[2] As further support for this conclusion, the Court of Appeals pointed out that neither before nor after plaintiff's accident had the stevedore asked the crew to rig safety lines, nor did the stevedore do so itself, although operations in the No. 4 lower hold continued that evening and throughout the following day. Pet. 10a. Consequently, the question of a bar to plaintiff's right of recovery against the ship never arose; on the facts of this case, there was simply no right of recovery to be barred.

II.

PETITIONER HAS POINTED TO NO EVIDENCE TO SUPPORT ITS CONTENTION THAT THIS CASE WAS WRONGLY DECIDED BY THE COURT BELOW.

The second "Question Presented" asks the Court to review the Court of Appeals' determination that there was insufficient evidence to permit a reasonable jury to find the defendants negligent. In its *per curiam* opinion, the court acknowledged the need for restraint in entering judgment N.O.V. Pet. 4a. Petitioner argued in his "Petition for Rehearing and Suggestion

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1. The absence of proof that the ship was or should have been aware of the claimed custom was pointed out by respondents in their briefs in the Court of Appeals, relying on *Miller* v. *The Sultana*, 176 F. 2d 203 (2d Cir. 1949). The court agreed (Pet. 10a), but the point was plainly not necessary to the result.

2. Although it probably makes no difference since stevedore operations in the No. 4 lower hold were going on continuously except for the dinner break, there was no evidence, contrary to petitioner's assertion at page 6 of the petition, that the custom required "ropes, guardrails or safety net around a deep tank if cargo was not actually being loaded or unloaded." All three witnesses who testified to the custom agreed that it applied only to tanks which were not to be worked. Trial Transcript 154, 200, 201, 319.

for Rehearing In Banc" that there was sufficient evidence to support the verdict, but no judge in active service requested a vote on the petition, and it was denied.

Petitioner points to no fact which suggests that the Court of Appeals did not reach the right result. Petitioner's argument that the vessel created the condition—i.e., an open hatch—that caused the plaintiff's injury (Pet. 14) would not imply liability even under the seaworthiness standard applicable prior to the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946). Even under that standard, which was characterized by Justice Rutledge in *Sieracki* as "a species of liability without fault,"[3] an injured longshoreman had the burden of proving that the condition which caused his injury was one that made the vessel unseaworthy—i.e., unfit for its intended purpose. *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96, 103 (1944). Clearly, an open cargo hatch about to be worked on a cargo ship is not such a condition.

III.

THERE IS NO CONFLICT BETWEEN THE HOLDING BELOW AND THE HOLDINGS OF THIS COURT, OR ANY OTHER COURT OF APPEALS.

A. There Is No Issue, on the Record of This Case, as to the Standard of Care Owed by Vessels to Longshoremen Under the 1972 Amendents.

Nothing in the opinion below conflicts with the decision in *Edmonds* v. *Compagnie General Transatlantique*, 99 S. Ct. 2753 (1979) *pet. for reh. den.*, 48 U. S. L. W. 3223 (October 2, 1979). Nor did *Edmonds* address the standard of care now applicable in third-party negligence actions brought under the 1972 amendments to the Longshoremen's and Harbor

3. 328 U. S. at 94, 95.

Workers' Compensation Act, 33 U. S. C. § 905(b). It may be, as petitioners suggest in *Santos*,[4] *Bachtel*,[5] and *Matthews*,[6] that this Court should examine the scope of the duty now owed by vessels to longshoremen to take affirmative action in respect of dangerous conditions arising during the course of stevedoring operations. However, that issue does not arise on the record of this case.

As petitioner points out, the case was submitted to the jury on an agreed standard of care instruction which was not disputed, by either side, on appeal. Pet. 9. *Tyrrell* v. *District of Columbia*, 243 U. S. 1 (1917). Moreover the result would have been the same in this case regardless of how the standard of care owed by vessels to longshoremen was described.

In *Santos* and *Bachtel*, the Ninth Circuit characterized the vessel's obligation as one of protecting longshoremen from "unreasonable risk of harm," tracing the lineage of that standard of care to *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 625, 630-632 (1959). *Bachtel*, *supra* n. 5, at A-9. In this case, the Court of Appeals held that, on the facts, "an open tank is a condition routinely encountered by longshoremen," and that there was thus "no reason to anticipate that anyone would be harmed by it." Pet. 8a. The court buttressed its holding with authorities from the Second and Ninth Circuits decided under maritime negligence concepts that are virtually indistinguishable from this Court's analysis in *Kermarec*.[7] Pet. 10a. Indeed, "unreasonable risk of harm" cannot realistically be distinguished from the agreed standard applied in the court below. Since the court below held that the open tank did not pose an unreasonable risk of harm to longshoremen, there can

4. *Scindia Steam Navigation Co., Ltd.* v. *Santos*, No. 79-512.

5. *Mammoth Bulk Carriers, Ltd.* v. *Bachtel*, No. 79-538.

6. *Ernst Russ Steamship Co.* v. *Matthews*, No. 79-624.

7. *Long* v. *Silver Line, Ltd.*, 48 F. 2d 15 (2d Cir. 1931), *Miller* v. *The Sultana*, 176 F. 2d 203 (2d Cir. 1949), and *Ove Tysko* v. *Royal Mail Steam Packet Co.*, 81 F. 2d 960 (9th Cir. 1936).

be no conflict with *Santos* and *Bachtel*. Whatever differences there may be in *dicta* would not warrant review of this case on certiorari.

B. The Holding Below Was Consistent with Land-Based Principles of the Law of Negligence.

The holding in this case was consistent with the land-based principles of negligence the application of which is enjoined by the 1972 amendments. H. R. Rep. No. 92-1441, 92d Cong., Sess., *reprinted in* 3 [1972] U. S. Code Cong. & Adm. News 4698, 4703. "Negligence . . . necessarily involves a foreseeable risk, a threatened danger of injury, and conduct unreasonable in proportion to the danger." Prosser, *Law of Torts* (4th Ed. 1971), at 250. Conversely, "there is no liability for harm resulting from conditions from which no unreasonable risk was to be anticipated. . . ." *Prosser, supra* at 393. The agreed standard of care applied in this case and in the other decisions cited by the court below (Pet. 6a, 7a), is consistent with these principles of the law of negligence. Sections 343 and 343A of the *Restatement* (Second) *of Torts* (1956), merely restate these principles in the context of one of the factual circumstances that may arise in a negligence claim—i.e., the open and obvious condition. Thus, if a dangerous condition on board ship is one that is obvious and routinely encountered by longshoremen in the performance of their duties, it is not reasonable to anticipate that harm will befall them as a result of it, and the condition is not unreasonably dangerous. If there is reason to anticipate harm notwithstanding the obviousness of the condition, the opposite result would obtain. *Cf., Prosser, supra*, at 394.

The court below concluded that there was no evidence to suggest that respondents should have anticipated that harm might befall a longshoreman from a condition—open deep tanks—routinely encountered in the course of their work. This

case was thus properly decided in accordance with a legal standard of care that is consistent with the intent of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act.

CONCLUSION.

The petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

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